



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC NO. 39 OF 2013

REBECCA CHEPCHIRCHIR.....PLAINTIFF

VERSUS

STEPHEN TANUL.....1ST DEFENDANT

FRANCIS MALOMBA.....2ND DEFENDANT

SAMWEL CHEPKULEI.....3RD DEFENDANT

FRANCIS OSUNA.....4TH DEFENDANT

PASTOR SIRIMA.....5TH DEFENDANT

STEPHEN MUTISO.....6TH DEFENDANT

JUDGMENT

By a plaint dated 14th November 2005 the plaintiff herein sued the defendants jointly and severally seeking the following orders;

- a) An eviction order to remove the defendants from the plaintiff's parcel of land and a declaration that the plaintiff is the sole registered owner of all that parcel of land known as ELDORET MUNICIPALITY/BLOCK 20 (KAPYEMIT) 33
- b) Mesne profits for illegal occupation and utilization of the plaintiff's land
- c) Costs and interests of the suit
- d) Any further orders the court may deem fit to grant

The defendants filed a defence on 14th December 2005 and the matter proceeded to full hearing.

PLAINTIFF'S CASE

The plaintiff gave evidence and stated that she is the sole registered owner of the suit land and as such the defendants are trespassers on her suit land. She produced a copy of a title deed, certificate of official search and rates payment receipts to prove that she is the owner. She further stated that she never sold the land to the defendants.

The plaintiff also stated that it was the evidence of the 1st defendant that he purchased the property from the deceased but he did not produce any evidence to prove that he is the registered owner of the suit land and he has the right to sell it. It was the evidence of the 1st defendant that he never obtained consent from the Land Control Board. The plaintiff therefore urged the court to grant the orders as prayed in the plaint.

PLAINTIFF'S SUBMISSION

The plaintiff's submissions summarised the evidence of all the witnesses and proceeded to address the issues for determination and the

relevant statutes and precedents in support of her case.

Counsel for the plaintiff cited section 24(a) and 26 of the Land Registration Act that refer to proprietorship and indefeasibility of title. He submitted that the plaintiff produced a title to the suit land which was registered in her name and that the ownership has not been challenged that she acquired the land illegally and she is said to have acquired the land after the death of the deceased who had married her according to Nandi customs.

The other defendants did not apply for LCB consent, the 2nd to 5th defendants did not exercise due diligence of carrying out a search before proceeding to enter into a land transaction to purchase the suit land. It was their evidence that upon conducting a search they found that the land was registered in the name of the plaintiff. The 1st defendant had no right to sell the land to any of them and therefore they do not have the protection of being innocent purchasers for value. The plaintiff cited the case of *Katende v Haridar & Company Limited* (2008) 2 EA. 173 which set down the threshold for a purchaser to rely on the bona fide doctrine.

It was Counsel's submission that 1st defendant contended that he purchased the suit land at a sum of kshs. 2,400/- and he produced a sale agreement but from the said evidence there is no indication of the particular land that was being sold to the 1st defendant. That there was no identity card of the buyer and the seller therefore the agreement cannot be relied on as proof of sale as it has not specified the important details and has not passed the threshold of section 3(3) of the Law of Contract Act. The defendant did not produce any document showing the transmission or acknowledgement of the said sum.

Counsel submitted that for one to prove a claim based on adverse possession one must demonstrate that he has been in possession of the land for a continuous uninterrupted period of at least 12 years. Such possession must be peaceful and open without secrecy and without force. That the 1st defendant occupied the suit land with the permission of the deceased and produced a sale agreement which omitted important facts hence not enforceable in law. He also testified that he never sought consent from the LCB.

Counsel further submitted that the plaintiff was the registered owner of the suit land on 22/9/1993 and the period between then and when the suit arose was not 12 months. The 1st defendant began selling the suit land in 2001 and he was not the owner of the suit land at the time. Counsel cited the case of **Henry Mwangi Kihara v Racheal Nyambura Kimani & 4 others** on when the time in adverse possession begins to run.

Counsel also submitted that from the plaintiff's evidence it is clear that she tried to have the defendants leave her parcel of land before the 12 years had lapsed therefore they did not have peaceful possession of the land. Counsel therefore urged the court to grant the orders as prayed.

DEFENDANT'S CASE

DW1, Stephen K. Tanui testified that he bought 2 acres of land on 22/1/1982 from the deceased and lived there until 2001 when he sold the land to 11 people including the defendants. He stated that he knew the plaintiff as a family member and bought the land from her mother. He testified that Stephen Kimaiyo bought 2 acres and has a title deed.

It was his evidence that he paid the purchase price in full whereby they all signed that the plaintiff got a title in 1993 and the chief wrote him 2 letters, one on 18/3/2013 and another on 11/10/2006 and also produced proceedings from the agreement of 25 elders dated 29/3/1986 and prayed he be given 2 acres from the plaintiff's land.

On cross examination he confirmed that the sale agreement had no parcel number and no ID number of the people concerned. He had no LCB consent and no title deed to the 2 acres he owned and that the letter of 2013 from the chief was written when the case was already in court and the letter of 2006 did not mention the parcel number.

DW1 confirmed that he had received a letter that he had trespassed on the plaintiff's land and that she had been given a title deed by the deceased. He told the court that the land was surveyed on 22/1/1982 and the sale agreement was done on 21/1/1982. The deceased had an ID card by then and he had no ID card.

DW2 was one Shadrack Ruto who testified that he knew the plaintiff and the 1st defendant. He stated that he was the Secretary of Kapyemit from 1973 to 1993. He knew the land belonged to Taprandich. The plaintiff was married to Taprandich's son. The government wanted to issue title deeds and he summoned all the members and asked them to register on 22/1/1982. Taprandich wanted to register in Stephen Tanui's name but he was not the right grandson. She sold Stephen Tanui 2 acres and they stayed peacefully until the plaintiff got married.

He further told the court that they included the deceased into the register and in 1988-1989 the surveyor came to the land and made an error by giving Stephen Tanui the wrong land which was ½ of an acre as Stephen was staying on 2 acres. He told the court that they gave her a title deed and Stephen has a right to 2 acres, further, Rebecca was given the land by the deceased.

On cross exam he confirmed that he had no proof to show he was a secretary of the company known as Kapyemit(k) Ltd.

DW3 was Wilfred K Chesingil who told the court he stays in Kapyemit maili nne and he knew the history of the suit land. He was a committee member of the farm from 1982-1993. He confirmed that the deceased wanted to give the land to Stephen in 1992 when the government wanted to issue title deeds but they declined. He told the court that the deceased sold 2 acres to Stephen and remained with 8 acres. He didn't know whether she sold to another person. He confirmed that the plaintiff is the one who had the title deed.

He confirmed that the plaintiff inherited the land from her husband and got the title deed in 1993. He stated that under Nandi customary law

Stephen had no right to inherit the land in question. Stephen never raised any issue on the burial day of his grandmother.

DW4, the 3rd defendant in the case stated that the suit land is 33 and not 34. He bought 50ft x 100ft and paid kshs. 140,000/- to Stephen. He bought the land in 7/11/2002 and has lived there to date. The plaintiff is peaceful with him and he prayed he be given 1/8 of an acre.

On cross examination he stated that he bought parcel no. 33 Eldoret Municipality Block 20 but neither went to the lands office to do a search nor obtain an LCB consent. He stated that he claims 1/8 of an acre from the 1st defendant and that he received a letter indicating that he had trespassed on the suit plot.

DW6, Paul Sirma stated that he paid kshs. 160,000/- for ¼ of an acre from parcel no. 33 and Rebecca invited him to build on the but he has no proof to show that Rebecca and her sons helped him in building. He never conducted a search on the land. The agreement he made with Stephen was on 9/10/2003. He confirmed during re-examination that the land sold to him by Stephen legally belonged to the plaintiff.

DW7, Wilson Sawe Kiprono adopted his witness statement and on cross examination he told the court that the portion occupied by him was purchased by his deceased wife from Stephen. He never produced the agreement. It was purchased in 2001 but in 2004 they were told to vacate the land as it was not theirs.

It was his evidence that on conducting a search, he found that the land was registered in the plaintiff's name. He told the court that his claim is against Stephen and not the plaintiff.

ANALYSIS AND DETERMINATION

I have considered the evidence in this case and find that the issues for determination are as follows:

- a) Who is the registered owner of the suit land
- b) Whether the defendants are bonafide purchasers for value
- c) Whether the defendants have proven adverse possession
- d) Whether the Plaintiff is entitled to Mesne Profits

WHO IS THE REGISTERED OWNER OF THE SUIT LAND

The plaintiff gave evidence and produced a title deed registered in her name as proof of ownership of the suit land. She further produced an official search which indicates that the land belongs to her.

In Munyu Maina Vs.. Hiram Gathiha Maina, Civil Appeal No.239 of 2009, the Appeal Court held that: -

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

Section 26 of the Land Registration Act provides;

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

The defendant claimed that he had a sale agreement indicating that he purchased 2 acres of the suit land. He produced a sale agreement and did not produce a corresponding title for the land. The sale agreement had no parcel number therefore there is no proof of which parcel was purchased.

The land was agricultural land and therefore he needed to obtain a consent from the land Control Board in order to purchase the land. it has been confirmed that no such consent was obtained but if the parties had proved that there was constructive trust then the court could have come to a different conclusion.

WHETHER THE DEFENDANTS ARE BONAFIDE PURCHASERS' FOR VALUE

In KATENDE V HARIDAR & COMPANY LIMITED [2008] 2 E.A.173 where the Court of Appeal in Uganda held that:

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, ... (he) must prove that:

- (a) he holds a certificate of title;*
- (b) he purchased the property in good faith;*
- (c) he had no knowledge of the fraud;*
- (d) he purchased for valuable consideration;*
- (e) the vendors had apparent valid title;*
- (f) he purchased without notice of any fraud;*
- (g) he was not party to any fraud.”*

The defendants did not produce any certificates of title to show that they had purchased the portions of land they claimed. The vendor had no apparent valid title as he did not produce any such title or proof of title as evidence. DW4,5 and 6 confirmed that they did not obtain a LCB consent. The defendants did not meet the threshold set to prove that they were bona fide purchasers for value. The person who sold to them the land had no title to pass to them.

WHETHER THE DEFENDANTS HAVE PROVEN ADVERSE POSSESSION

The defendants never claimed adverse possession in their counterclaim. However, the plaintiff chose to address it in her submissions.

The ingredients of adverse possession were discussed by the court of Appeal in the case of **Mtana Lewa –v- Kahindi Ngala Mwangandi (2005) eKLR** where it was held that:

“Adverse Possession is essentially a situation where a person takes Possession of land, asserts rights over it and the person having title to it omits or neglects to take an action against such person in assertion of his title for a certain period, in Kenya 12 years.”

In **Samuel Miki Waweru vs. Jane Njeru Richu, Civil Appeal No. 122 of 2001**, the Court of Appeal delivered the following dictum:

“...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in Jandu v Kirpal [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted.

In **Titus Kigoro Munyi v. Peter Mburu Kimani (2015) eKLR** the court held;

“In the case of Francis Gitonga Macharia – v- Muiruri Waithaka, - Civil Appeal No. 110 of 1997 this Court stated that the limitation period for purposes of adverse possession only starts running after registration of the land in the name of the respondent. It follows that in the instant case; time for adverse possession could not run against the respondent prior to the year 1978 as he had no proprietary interest in the suit property. Time for adversity cannot run against a person who has no interest in the property....”

The Plaintiff became the registered owner of the suit land on 22/9/1993. The suit was filed in November 2005. Further, the 1st defendant testified that he never lived peacefully on the land therefore he cannot claim for adverse possession. The rest of the defendants purchased the suit land within a period of less than 12 years before the suit was filed.

WHETHER THE PLAINTIFF IS ENTITLED TO MESNE PROFITS

The Court of Appeal in the case of **Peter Mwangi Mbuthia & another v Samow Edin Osman [2014] eKLR** held that it was upon a party to place evidence before the court upon which an order of mesne profits could be made. The court stated as follows: -

“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”

Mense profits is a special damage which must be specifically pleaded and specifically proved. The same has not been proved it therefore fails.

I have considered the pleadings, the documentation produced, submission by Counsel and the relevant judicial authorities and come to the conclusion that the plaintiff has proved her case on a balance of probabilities and therefore enter judgment in the following terms.

a) A declaration is hereby issued that the plaintiff is the sole registered owner of all that parcel of land known as ELDORET MUNICIPALITY/BLOCK 20 (KAPYEMIT) 33

b) The defendants to give vacant possession of the suit land within 45 days failure of which an eviction order to issue.

c) Defendants to pay costs of the suit.

Dated and delivered at Eldoret on this 31st day of July, 2019.

M.A. ODENY

JUDGE

JUDGMENT READ IN OPEN COURT in the presence of Mr.Mitei for Defendants and Miss.Awinja holding brief for Mr.Chepkwony for Plaintiff.